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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 553

M. E. BLATT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN
OPPOSITION**

OPINION BELOW

The opinion of the court below (R. 371-385) is reported in 143 F. (2d) 268. The findings of fact, conclusions of law, and orders of the National Labor Relations Board (R. 2-17, 95-121) are reported in 38 N. L. R. B. 1210 and 47 N. L. R. B. 1055.

JURISDICTION

The decree of the court below (R. 385-387) was entered on July 5, 1944. The petition for a writ of certiorari was filed on October 4, 1944. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act is applicable to petitioner, which owns and operates a large department store in Atlantic City, New Jersey.
2. Whether certain anti-union notices posted by petitioner, which, in the context of other anti-union conduct, the Board found to be coercive, were privileged by virtue of the First Amendment.
3. Whether the Board may properly order petitioner to disestablish a labor organization which it has dominated and interfered with but not recognized.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the appendix to the petition for certiorari (Pet. 14-19).

STATEMENT

Upon usual proceedings under Section 10 of the Act (R. 1; 85-94), the Board, on February 14, 1942, issued its findings of fact, conclusions of law and order in Case No. C-1995 (R. 2-17) (Case No. 8493 in the court below), and, on February 26, 1943, issued its findings of fact, conclu-

sions of law and order in Case No. C-2371 (R. 95-121) (Case No. 8494 in the court below).¹ The facts, as found by the Board and as shown by the evidence in these two proceedings may be summarized as follows:²

Petitioner, a New Jersey corporation, owns and operates a retail department store in Atlantic City, New Jersey, in which it employs approximately 300 persons. It annually purchases merchandise for resale valued in excess of \$1,500,000, of which 95 percent is purchased in and shipped to petitioner from States other than New Jersey. Its annual gross sales of merchandise amount to more than \$2,000,000, about \$16,000 of which is shipped to points outside New Jersey. (R. 4, 97; 294, 122-123, 18-19.)

Organizational efforts among petitioner's employees began in December 1940 (R. 5; 21). On December 7, 1940, 8 or 10 of petitioner's employees attended a union meeting at which they selected 5 of their number to act as an organizing committee (R. 5; 23). A few days later, employee Flanagan, chairman of this committee, was approached by petitioner's general superintendent Rosenberg (R. 5; 75) who questioned him about the Union, whether he had joined it, whether he attended meetings, and what he expected to gain

¹ The Board corrected its order of February 26, 1943, by amendment on March 2, 1943 (R. 121).

² In the following statement, record references preceding the semicolons are to the Board's findings; succeeding references are to the supporting evidence.

thereby (R. 5; 32-33). When Flanagan replied that he had joined the Union in order to obtain a wage increase, Rosenberg countered that he could achieve that goal without affiliating with the Union and offered to secure a promotion for him (R. 5; 32-33). About a week later, when Flanagan was observed conversing with a stranger, Rosenberg again approached him, demanded to know whether the stranger was "one of the union men" and interrogated Flanagan further with respect to his union affiliation (R. 5; 81, 33). About the same time, Supervisor Alkazin, head of the receiving department (R. 5; 30, 68, 69), questioned both Flanagan and employee Mooney, one of the members of the organizing committee (R. 11; 23), about their union activities and referred to the meeting of December 7 as the "Ku Klux Klan meeting" (R. 5-6, 11; 58-59, 69, 70-71, 34, 48, 42).

About December 18, the Union requested a collective bargaining conference (R. 6; 24). Petitioner ignored the request (R. 6; 24-25) and instead struck boldly to destroy the union movement in its incipient stage. On December 24, petitioner discharged four of the five members of the Union's organizing committee (R. 6-9, 11-13; 34-35, 50, 51, 58, 73-74). The fifth member, employee Reitzler, who was absent during this period because of illness (R. 9; 42) was discharged when she returned to work on January 2, 1941 (R. 9-10; 43).

Upon the foregoing findings, the Board, in Case No. C-1995, concluded that petitioner was subject to the Act; that by questioning employees concerning their union membership and activities, disparaging the Union and seeking to induce employees to relinquish membership therein petitioner had violated Section 8 (1) of the Act; and that by discharging the five members of the Union's organizing committee for the purpose of discouraging union membership and activities, petitioner had violated Section 8 (3) of the Act (R. 14-15). On February 18, 1942, the Board issued its order directing petitioner to reinstate the discharged employees with back pay, to cease and desist from its unfair labor practices and to post appropriate notices (R. 15-17).

On March 18, petitioner posted two notices on its bulletin board side by side (R. 98-99; 124, 194). The first appeared to be in substantial compliance with the terms of the Board's order (R. 98-99; 290, 16); the second, plainly intended to counteract the force of the first (R. 100-101), anticipated resumption of the Union's organizational efforts, "called upon the employees to continue to deal directly with [petitioner] in the future, as they had for 25 years in the past, without the intervention of labor organizations, and clearly implied that such intervention would constitute the antithesis of a relationship based upon mutual confidence and cooperation between [petitioner] and its employees" (R. 100; 291). Shortly

thereafter, petitioner reinstated and made whole the employees it had discriminatorily discharged (R. 98-99; 290, 124).

On March 26, after the reinstatement of employee Reitzler, union organizational efforts, which had ceased with the discharges, were resumed (R. 101-103; 124, 145, 149). Petitioner immediately retaliated by barring all union discussion on the premises, even on the employees' free time. Employee Witsky, who had obtained signatures to membership applications during working hours, was severely reprimanded by the head of her department, excused for a week from all duties which would take her into other parts of the store, and instructed to report to him whenever she wished to leave the department (R. 101-102; 129-131, 273-274). The next day, March 27, the head of the fountain department assembled his employees and instructed them not to discuss the Union during working hours (R. 102; 216-217). Department-head Price, upon observing employee Chazin, a known union adherent, in conversation with another employee before working hours, interrupted the conversation and ordered Miss Chazin to leave the department. When Miss Chazin reported the incident to petitioner's personnel director, she was told "We are stopping the girls from discussing the Union in the store" (R. 102-193; 181-183). On the following days, petitioner's department heads and supervisors continued their concerted attempts to prevent

known union adherents from discussing the Union with other employees (R. 107-108; 155, 158, 175, 177).

During this period, another labor organization, Organized Workers' Association of the M. E. Blatt Company (hereinafter referred to as the Association), appeared on the scene and was accorded markedly different treatment by the employer (R. 103-109, 111-114; 125). The Association's efforts to obtain a following by soliciting employees on company time within the store were not only countenanced by petitioner, but were actively aided and supported by its supervisory staff (*id.*). Within the brief period of 8 days, from April 2 to April 9, the Association acquired a membership of more than 200 out of the 300 employees in the store (R. 108, 112; 125, 228, 259-261).

The Association held its first meeting on April 2 (R. 104, 112; 158, 228, 237). No circulars were issued, but notice of the meeting and its purpose was spread by word of mouth throughout the store (R. 104; 164, 228, 270-271) with such thoroughness that approximately 250 employees attended (R. 104; 135-136, 236). On the day following this meeting, petitioner posted another notice, which, as Silberman, petitioner's comptroller testified, and as the Board found, was directed not against the Association's campaign but against that of the Union (R. 105; 201-202). This notice read as follows (R. 291):

TO OUR EMPLOYEES

It has come to our attention that a group of our employees have met to form an organization for the purpose of collective bargaining and we wish to repeat that it is not necessary for any employee to join any organization or to pay dues to any organization in order to continue in our employ.

M. E. BLATT Co.

On Saturday, April 4 (the day before Easter, an unusually busy day for any department store), and on Monday, April 6 (R. 105-106, 112; 157, 197, 169), the Association conducted an intensive organizing drive, soliciting memberships on nearly every floor of the store on company time, with petitioner's tacit approval (R. 105-108, 112-113; 132-133, 138, 143-144, 155-158, 160-161, 165-166, 169-170, 172-173, 179-181, 188-189, 199, 247-248, 250). In fact, Supervisors Cohen, Reger, and Creighton joined in the campaign (R. 106-107, 113; 143-144, 185, 169).³ Miss Creighton told employee Watts that "she was surprised at her" because she was "the only girl in [Miss

³ Cohen was in charge of the marking room in the receiving department (R. 106; 142-143, 148, 251-252, 253-254). Miss Creighton was an assistant to Mary Price, who supervised at least eight departments on the first floor (R. 106; 168-169, 173). Miss Creighton possessed authority to transfer employees from department to department, to sign credits and shopping passes, and to inform her supervisor of misbehavior or inefficiency of subordinates (R. 106; 267-269, 275). Miss Reger had direct charge of eight or nine girls in the auditing department (R. 106; 189, 208, 270-271).

Creighton's] department who belonged to the Union" and that "all the other girls" were joining the Association; she expressly advised Miss Watts to abandon the Union and join the Association instead (R. 106; 169). On another occasion, Miss Creighton was overheard to remark to Supervisor Reger, "When I get through talking to them there will be two members less for the A. F. of L." (R. 106; 185).⁴

On the evening of April 6, at a meeting which again was advertised by word of mouth throughout the store (R. 108; 164-165, 271-272, 226-227, 228, 229-230), a certificate of incorporation for the Association was executed (R. 108; 221-222, 243-244, 256, 296-297).⁵ The following day a letter advising petitioner of the existence of the Association was circulated throughout the store for examination and signature (R. 108; 175-176, 230-231, 244-245). On April 9, 20 employees, including Cohen, gathered in the store to inspect a proposed Association constitution (R. 108-109; 161-163, 219-220, 222, 223-224, 239-242, 256-257, 264-265). Not once did petitioner attempt to

⁴ Miss Reger, who had attended the Association's first meeting (R. 270-271), used no less effective methods to accomplish the same objective. In one instance, when union member Mrs. Witsky was being pressed by Association organizers to change sides, Miss Reger joined the group and reminded Mrs. Witsky of an occasion on which union membership had resulted in discharge (R. 136-137).

⁵ One of the incorporators was Supervisor Cohen (R. 243, 297).

interfere with these activities (R. 112). Subsequently, Cohen was elected vice president of the Association and Supervisor Reger was elected recording secretary (R. 110, 113; 222, 238, 246). They thereby became *ex officio* members of the Association's board of directors, empowered under its constitution and by-laws to enter into negotiations with petitioner respecting terms and conditions of employment (R. 110; 246, 249, 298). On April 10, petitioner notified the Board that the Association had requested recognition as exclusive bargaining representative (R. 109; 302).

Upon the foregoing findings, the Board, in Case No. C-2371, concluded that petitioner's continued manifestations of hostility to the Union coupled with its support of the Association had deprived the employees of the full freedom of choice which the Act guarantees (R. 111). Viewing the notices posted by petitioner on March 18 and April 3 (pp. 5, 8, *supra*) in the total context of petitioner's discriminatory and coercive conduct, including its interference with the formation and administration of the Independent, the Board concluded that the notices, too, infringed the rights of the employees, and that by its entire course of conduct petitioner had violated Sections 8 (1) and (2) of the Act (R. 111-114). The Board ordered petitioner to cease and desist from its unfair labor practices, to withhold recognition from and completely disestablish the Association

and to post appropriate notices (R. 118-119, 121).

On October 7, 1943, the Board filed petitions in the court below to enforce its orders in both cases (R. 349-351, 356-359). On June 9, 1944, the court handed down a single opinion enforcing the Board's orders in full (R. 371-385). On July 5, 1944, a decree was entered in conformity with the opinion (R. 385-387).

ARGUMENT

1. Petitioner's contention (Pet. 6-8, 25-35) that although it annually sells and distributes merchandise valued at more than \$1,500,000, 95 percent of which it receives through the usual channels of interstate commerce, it is nevertheless not subject to the Act, is, as the Board and the court below held unsound. *Newport News Shipbuilding & Dry Dock Co. v. National Labor Relations Board*, 101 F. (2d) 841, 843 (C. C. A. 4), modified in other respects, 308 U. S. 241; *J. L. Brandeis & Sons v. National Labor Relations Board*, 142 F. (2d) 977 (C. C. A. 8), certiorari denied, October 16, 1944, No. 385 this Term; *National Labor Relations Board v. J. L. Hudson Co.*, 135 F. (2d) 380 (C. C. A. 6), certiorari denied, 320 U. S. 740; *Virginia Electric & Power Co. v. National Labor Relations Board*, 115 F. (2d) 414, 416 (C. C. A. 4), reversed and remanded on other grounds, 314 U. S. 469, 476; cf. *Local 167, International Brotherhood of Teamsters v. United States*, 291 U. S. 293, 297; *Dahnke-*

Walker Milling Co. v. Bondurant, 257 U. S. 282, 290-291; *Wickard v. Filburn*, 317 U. S. 111, 125. Moreover, petitioner annually sells and ships merchandise valued at about \$16,000 to out-of-State customers. The employer's petition for certiorari in the *J. L. Brandeis* case, *supra*, denied on October 16, 1944, was premised upon the identical considerations petitioner raises here. No questions of general importance are presented, and no conflict of decisions is shown.

2. Petitioner asserts (Pet. 9-11, 35-47) that the notices which it posted on March 18, 1942, and April 3, 1942, were constitutionally privileged and that the court below therefore erred in approving the Board's finding that the notices violated Section 8 (1) of the Act. This contention rests, however, upon an artificial abstraction of the notices from the entire background and complex of petitioner's activities in the light of which the notices were appraised by the Board and found to have coercive significance. The court below, as did the Board, expressly considered the notices, not merely in isolation, but "in the light of * * * [petitioner's] other acts in furtherance of the Association and in hindrance of the organization of the Union (R. 384, 381), and properly sustained the Board's conclusion." *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U. S. 533, 538-539; *National Labor*

⁶ The court below found that the notice of March 18, standing alone, could not be deemed a violation of the Act, but

Relations Board v. Trojan Powder Co., 135 F. (2d) 337, 339 (C. C. A. 3), certiorari denied, 320 U. S. 768; *Elastic Stop Nut Corp. v. National Labor Relations Board*, 142 F. (2d) 371 (C. C. A. 8), certiorari denied, October 9, 1944, No. 224 this Term; *Reliance Mfg. Co. v. National Labor Relations Board*, 143 F. (2d) 761 (C. C. A. 7); *National Labor Relations Board v. William Davies Co.*, 135 F. (2d) 179, 181 (C. C. A. 7), certiorari denied, 320 U. S. 770.

No conflict of decisions is presented, for in *National Labor Relations Board v. American Tube Bending Co.*, 134 F. (2d) 993 (C. C. A. 2), certiorari denied, 320 U. S. 768, upon which petitioner relies,⁷ the record consisted of nothing but an employer's letter and speech delivered on the eve of an election, and the circuit court of appeals expressly

was such a violation when considered in the entire context of petitioner's conduct (R. 383-384). The court regarded the notice of April 3 "to be objectionable in itself" but "particularly so" when considered in its entire context (R. 384).

⁷ Except for *National Labor Relations Board v. Citizen-News Co.*, 134 F. (2d) 970 (C. C. A. 9), the other cases upon which petitioner relies (Pet. 10, 42, 44, 45) were either decided prior to *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, or arose in the same circuit as the instant case. In the *Citizen-News Co.* case, the Ninth Circuit viewed (134 F. (2d) at pp. 971-972) the Board's opinion with respect to the oral statements as resting entirely on the statements divorced from the other factors in the case. It felt bound, as did the Second Circuit in *National Labor Relations Board v. American Tube Bending Co.*, 134 F. (2d) 993, certiorari denied, 320 U. S. 768, by this Court's opinion in the *Virginia Electric* case (314 U. S. 469).

predicated its holding upon the absence of any setting of employer conduct in the light of which the Board could appraise the tendency of these utterances to affect the employees' freedom of choice (134 F. (2d) at p. 995). Thus, the court there recognized the principle enunciated by this Court (*National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, 477), and applied by the court below (R. 382), that "conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act."

In this posture, contrary to petitioner's contention (Pet. 10-11, 45-47), the case at bar does not present an appropriate occasion to explore the basis of the holding in the first *Virginia Electric & Power* case (314 U. S. 469), as to which the court below (R. 382-383) deemed itself at variance with the Circuit Court of Appeals for the Second Circuit. In the *American Tube Bending* case, the Second Circuit expressed doubt whether the *Virginia Electric* case was remanded to the Board because the Company's claim of constitutional privilege was found meritorious or because the utterances, standing alone, were thought to constitute insufficient evidence to support the finding of coercion. While conceding that "it makes no difference which view we take," the Second Circuit intimated that it was inclined to the former view (134 F. (2d) at p. 995). The court below

attributed to the Second Circuit a third interpretation of the *Virginia Electric* case. It believed that the Second Circuit construed the *Virginia Electric* case to mean that with respect to speech not on its face coercive, the constitutional privilege is "absolute" (R. 383), by which we understand the court below to mean constitutionally privileged irrespective of other entangled circumstances. The Third Circuit expressed the view that the *Virginia Electric* case merely held that the utterances there considered were not, standing alone, coercive (R. 383). On the divergence in viewpoint between the Second and Third Circuits assumed by the court below, we would agree with the latter's viewpoint, but we do not so interpret the *American Tube Bending* opinion. The Second Circuit seems clearly to have considered the *Virginia Electric* utterances as constitutionally privileged only when standing alone, and not when regarded as parts of the whole complex of circumstances (134 F. (2d) at p. 995). We believe that nothing in the *American Tube Bending* decision would have precluded the Second Circuit from holding that the notices in the instant case considered in their whole setting violated the Act. And certainly there is no reason to believe that the Second Circuit would not have reached the same ultimate result, in view of the other acts of petitioner which constituted unfair labor practices, in sustaining the order based on violation of Section 8 (1) of the Act.

3. It is urged (Pet. 11-12, 48-49) that the Board erred in ordering petitioner "completely [to] disestablish the Association," although petitioner concedes that on the findings made the order requiring petitioner to withhold recognition from the Association is proper. The first argument advanced in support of this contention is that since petitioner did not "control" the Association, the Board is powerless to order its disestablishment. But the Board's findings that petitioner "dominated and interfered with the formation and administration of the Association and contributed support to it" within the meaning of Section 8 (2) of the Act, and that the Association was consequently "incapable of representing the employees for the purposes of collective bargaining" (R. 117) are entirely adequate to support the normal remedy of disestablishment, as the courts have uniformly held.⁸ It is well settled that the continued existence of a labor organization found by the Board to have been

⁸ A showing that an employer dominates the internal affairs of a labor organization, is not, contrary to petitioner's apparent belief, necessary to support an order of disestablishment. *National Labor Relations Board v. Newport News Shipbuilding & Drydock Co.*, 308 U. S. 241, 247; *Reliance Manufacturing Co. v. National Labor Relations Board*, 125 F. (2d) 311, 314 (C. C. A. 7); *Roebling Employees Association v. National Labor Relations Board*, 120 F. (2d) 289, 295-296 (C. C. A. 3). In any event, as the facts set forth in the Statement show (*supra*, pp. 9-10), petitioner's representatives held controlling positions in the Association.

dominated and supported by an employer "thwarts the purposes of the Act." *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 236.

Petitioner's assertion that the order is improper because petitioner is unable to comply with it is groundless. Having by its illegal interference and support established the Association as a barrier to the free exercise of its employees' rights to self-organization, petitioner cannot evade its obligation of "wiping the slate clean" *National Labor Relations Board v. Newport News Shipbuilding & Drydock Co.*, 308 U. S. 241, 250.

Finally, petitioner states that the Board was powerless to order disestablishment of the Association because petitioner has not recognized the Association as exclusive bargaining representative. Petitioner advances no reasons in support of this position but relies (Pet. 12, 49) solely upon the decision by a divided court in *National Labor Relations Board v. Germain Seed & Plant Co.*, 134 F. (2d) 94, 99 (C. C. A. 9). We submit that, contrary to petitioner's view, the *Germain Seed* case is not in conflict with the decision of the court below. The unique factual situation and the order modified in that case did not, in the view of the court, pose the issue here presented. In that case, employees had designated, and the employer had recognized, the directors of a company-dominated union as the exclusive

bargaining representatives. And the Board found, *inter alia*, that the Company had recognized the union (37 N. L. R. B. 1090, 1100) and ordered the Company to withdraw recognition from and disestablish it (37 N. L. R. B. 1090, 1107). The court held that since the employees had designated and the employer had recognized not the union, but only the directors, the Board erred in finding that the Company had recognized the union (134 F. (2d) at p. 99). Evidently assuming that the provision requiring the employer to withdraw recognition from the union was predicated upon this finding, which the court considered erroneous, the court, Judge Denman dissenting, declined (134 F. (2d) at p. 99) to enforce the section of the order containing the withdrawal and disestablishment requirements. In a concurring opinion, Judge Stephens stated that the court was unable to determine what type of order the Board would have entered if it had distinguished between recognition of the directors and recognition of the union, and suggested that the Board could easily enter a supplemental order if the Board thought a broader order than that enforced by the court was necessary to effectuate the policies of the Act (134 F. (2d) at pp. 99-100). Judge Denman, in his dissenting opinion, construed Judge Stephens' opinion to mean that if the Board should enter a supplemental order directing the disestablishment of the Association,

Judge Stephens would agree to enforce the order despite the fact that the Company had not recognized the union (134 F. (2d) at p. 101). Thus it is evident that the court did not pass upon the question of whether the Board had the power to order the disestablishment of a dominated union which had not been accorded recognition by the employer.

In the instant case, unlike the *Germain Seed* case, the Board found that petitioner had not recognized the Association and, instead of ordering the withdrawal of recognition, ordered petitioner to refrain from recognizing the Association. The order in the instant case did include a provision requiring petitioner completely to disestablish the Association. Such an order, based on the Board's finding (R. 117) that as a consequence of petitioner's interference and domination the Association "is incapable of representing the employees for the purpose of collective bargaining," constitutes, under Section 10 (c) of the National Labor Relations Act, an appropriate exercise of the Board's discretion to determine how the effect of unfair labor practices may be expunged. Cf. *Utah Copper Co. v. National Labor Relations Board*, 139 F. (2d) 788, 791 (C. C. A. 10), certiorari denied, April 24, 1944, *sub nom. Independent Association of Mill Workers v. National Labor Relations Board*, No. 802, October Term, 1943; *National Labor Relations*

Board v. Freezer & Son, 95 F. (2d) 840, 841-842 (C. C. A. 4). The decision below is clearly correct. Since no court has held that disestablishment is inappropriate because of the absence of formal recognition, we do not believe that the question is one that warrants review by this Court.

CONCLUSION

The decision below is correct in all respects and presents no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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NOVEMBER 1944.